Nallammal & Anor v Karuppanan & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO F449 OF 1985
LIM BENG CHOON J
6 AUGUST 1993

Land Law *— Lien-holder's caveat — Title obtained by fraud or misrepresentation — Whether first defendant could use document obtained by fraud or misrepresentation to enable creditor to lodge lien-holder's caveat*

Contract *— Non est factum — Thumb-print obtained by fraud or misrepresentation*

Land Law *— Lien-holder's caveat — Title obtained by fraud or misrepresentation — Validity of lien-holder's caveat — Caveator not party to fraud or misrepresentation — Whether caveator could enforce security*

The first plaintiff, the registered proprietor of a piece of land ('the disputed land'), loaned the title of the disputed land to the first defendant upon his request, in the belief that he required it in respect of some contract works and on condition that the title be returned to her within a month or two. The first defendant later brought a document ('D6') for the first plaintiff to affix her thumb-print on. The first defendant used the title as security for a loan obtained from the second defendant and the second defendant lodged a lien-holder's caveat over the disputed land. The plaintiffs brought a suit seeking: (a) for a declaration that all documents purported to have been signed or thumb-printed by the first plaintiff be declared null and void; (b) that the entries in respect of the lien-holder's caveat lodged by the second defendant be removed and expunged from the records; (c) that the lien-holder's caveat be declared null and void and of no legal effect; and (d) that the disputed land be released by the second defendant. The plaintiffs contended that the first defendant had failed to disclose the actual purpose of taking the title and had fraudulently obtained the first plaintiff's thumb-print, or alternatively, that the first defendant had gained possession of the title by misrepresentation. In his defence, the first defendant contended that he had informed the plaintiffs that he required the title as security for a loan from a bank, while the second defendant contended that no fraud was committed and, if there was any, it was committed by the first defendant.

Held, allowing the plaintiffs' claim:

(1) The first defendant did not convey to the plaintiffs that he wanted to use the title of the disputed land as security for the loan from the second defendant. The first defendant defrauded the plaintiffs in order to get possession of the title of the disputed land and by his wilful act of misleading the plaintiffs, the first plaintiff stood deprived of ownership and possession of the disputed land.

(2) It was clear that the doctrine of non est factum was available to the plaintiffs because: (a) the first plaintiff had no knowledge at all

regarding the contents of D6 on which she affixed her thumb-print; (b) this complete lack of knowledge resulted in her thinking that she was signing a document which she believed would not have the legal effect created by D6; and (c) she had unknowingly and without any fault on her part thumb-printed D6 which had an adverse effect on her ownership and possession of the disputed land. Indeed, the first plaintiff was wrongfully misled or induced by the first defendant to affix her thumb-print on D6. In allowing the plea of non est factum against the first defendant, the first defendant therefore had no right in law to make use of D6 as security for the loan and to enable the second defendant to lodge a lien-holder's caveat on the disputed land.

3) As the possession of the title to the disputed land was obtained by the first defendant through fraud or misrepresentation, the deposit of title had never been authorized by the first plaintiff, the proprietor of the disputed land. There was insufficient proof of the alleged Torrens lien or statutory lien purported to be created by the first plaintiff. On the contrary, the plaintiffs had discharged the burden of proving that the title of the disputed land had been wrongfully taken from the first plaintiff. Therefore, the lien-holder's caveat was likewise wrongfully lodged on the disputed land. The second defendant was in no better position than the first defendant and therefore could not enforce the security. As such, the caveat was removed and costs for this action was to be borne by both the defendants.

[Bahasa Malaysia summary

Plaintif pertama, yang merupakan tuan punya berdaftar sebidang tanah ('tanah itu'), telah meminjam suratikatan hakmilik tanah itu kepada defendan pertama dengan kepercayaan bahawa beliau memerlukannya untuk membiayai kerja-kerja kontrak dan atas syarat bahawa suratikatan hakmilik itu dipulangkan kepada plaintif dalam tempoh satu atau dua bulan. Defendan pertama kemudiannya telah membawa satu dokumen ('D6') untuk dicap jari oleh plaintif pertama. Defendan pertama telah menggunakan suratikatan hakmilik itu sebagai cagaran untuk suatu pinjaman daripada defendan kedua dan defendan kedua telah memasukkan suatu kaveat pemegang lien ke atas tanah itu. Plaintif telah membawa tindakan untuk: (a) satu deklarasi bahawa semua dokumen yang telah ditandatangani atau diletakkan cap jari oleh plaintif pertama adalah batal dan tidak sah; (b) bahawa semua catatan berkaitan dengan kaveat pemegang lien yang dimasukkan oleh defendan kedua disingkir dan dikeluarkan dari rekod; (c) kaveat pemegang lien itu diisytiharkan sebagai batal dan tidak sah; (d) tanah itu dilepaskan oleh defendan kedua. Plaintif menegaskan bahawa defendan pertama telah gagal mendedahkan tujuan sebenar untuk meminjam suratikatan hakmilik tersebut dan beliau telah memperolehi cap jari plaintif pertama dengan melakukan fraud, atau sebagai

alternatif, bahawa defendan pertama telah memperolehi suratikatan hakmilik itu melalui salah nyata. Dalam pembelaannya, defendan pertama menegaskan bahawa beliau telahpun memberitahu plaintif bahawa beliau memerlukan suratikatan tersebut sebagai cagaran untuk satu pinjaman daripada sebuah bank. Sementera itu, defendan kedua menegaskan bahawa tidak ada fraud yang dilakukan oleh sesiapa dalam kes ini dan walaupun ada, ia telah dilakukan oleh defendan pertama.

Diputuskan, membenarkan permohonan itu:

(1) Defendan pertama tidak memberitahu plaintif bahawa beliau ingin menggunakan suratikatan hakmilik tanah itu sebagai cagaran untuk pinjaman daripada defendan kedua. Defendan pertama telah melakukan fraud ke atas plaintif untuk mendapatkan suratikatan hakmilik tanah itu dan melalui perbuatannya yang sengaja hendak memperdayakan plaintif, plaintif pertama telah kehilangan keempunyaan dan milikan tanah itu.

(2) Doktrin non est factum dengan jelas boleh digunakan oleh plaintif kerana: (a) plaintif pertama tidak mempunyai sebarang pengetahuan mengenai kandungan D6 di atas mana beliau telah mengecap jarinya; (b) ketiadaan pengetahuan ini mengakibatkannya memikir bahawa beliau telah menandatangani suatu dokumen yang dipercayainya tidak akan mempunyai kesan undang-undang yang diwujudkan oleh D6; (c) tanpa mengetahuinya dan tanpa apa-apa kesalahan dilakukan olehnya, beliau telah mengecap jarinya pada D6 yang memudaratkan keempunyaan dan milikannya terhadap tanah itu. Defendan pertama memang telah memperdayakan atau mendorongnya supaya mengecap jarinya pada D6. Dengan membenarkan pli non est factum terhadap defendan pertama, defendan pertama dengan itu tidak mempunyai sebarang hak di sisi undang-undang untuk menggunakan D6 sebagai cagaran untuk pinjaman dan membolehkan defendan kedua memasuki kaveat pemegang lien ke atas tanah itu.

3) Oleh kerana milikan suratikatan hakmilik tanah itu telah diperolehi oleh defendan pertama melalui fraud atau salah nyata, deposit suratikatan hakmilik itu tidak diberikuasa oleh plaintif pertama, tuan punya tanah itu. Tidak terdapat keterangan yang mencukupi tentang lien Torrens atau lien statutori yang dikatakan telah diwujudkan oleh plaintif pertama. Sebaliknya, plaintif telah membuktikan bahawa hakmilik tanah itu telah diambil dengan salah daripada plaintif pertama. Dengan demikian, kaveat pemegang lien juga telah dimasukkan dengan salah ke atas tanah itu. Defendan kedua tidak berada dalam kedudukan yang lebih baik daripada defendan pertama dan oleh itu, tidak boleh menguatkuasakan cagaran itu. Dengan itu, kaveat ke atas tanah tersebut dilepaskan dan kos untuk tindakan ini ditanggung oleh kedua-dua defendan.]

Cases referred to

1 *Foster v Mackinnon* (1869) LR 4 CP 704 (refd)
2 *Saunders v Anglia Building Society* [1971] AC 1004; [1970] 3 All ER 961; [1970] 3 WLR 1078 (refd)
3 *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 (refd)
4 *Kingsnorth Trust Ltd v Bell & Ors* [1986] 1 All ER 423; [1986] 1 WLR 119 (folld)

E Ramasamy (*E Ramasamy & Co*) for the plaintiffs.
Ramdas Tikamdas (*Siva Ram & Associates*) for the first defendant.
Haji Zamani bin Ibrahim (*Hisham, Sobri & Kadir*) for the second defendant.

Cur Adv Vult

Lim Beng Choon J: In this suit, the plaintiffs are praying firstly, for a declaration that all documents purported to have been signed or thumb-printed by the first plaintiff for the purpose of creating a lien-holder's caveat over her land, known as Lot No 238, EMR No 2118 in the Mukim of Batang Berjuntai, in the District of Kuala Selangor, in the State of Selangor (hereinafter referred to as 'the disputed land') be declared null and void and of no effect. Secondly, they are also asking that the entries in respect of the lien-holder's caveat lodged by the Bank Buruh (M) Bhd ('the second defendant'), vide Presentation No 27/78, Jilid 7, Folio 57 dated 3 March 1978, over the disputed land be removed or be expunged from the records of the proper authorities concerned. Thirdly, they claim that as more than six years have lapsed since the creation of the said lien-holder's caveat, it can therefore be declared null and void and of no legal effect. By reasons of the three aforementioned prayers, they therefore ask that the disputed land be released by the second defendant to the plaintiffs, and that damages and costs of this action be paid by the defendants for fraud. However, at the trial, counsel for the plaintiffs informed this court that the plaintiffs were no longer asking for damages. The claim for damages has thus been abandoned.

The second and first plaintiffs are husband and wife and, at the time of the trial of this case, they were 71 years and 64 years old, respectively. The first plaintiff claimed that from her savings acquired from her earnings as a rubber tapper for some 25 years, she was able to purchase the disputed land in 1975 and the purchase of the land was duly registered and the title of the disputed land was issued to her as the new owner — see exh P1. She built a house on the disputed land, in which she was, and still is, residing. On or about 20 February 1977, the first defendant went to the plaintiffs' house and asked for a loan of the title which he said he required in respect of some contract works which he wanted to perform. The first plaintiff was at first reluctant to hand the title to the first defendant, but after some persuasion by her husband, she agreed to and did hand over the title to the second plaintiff to give to the first defendant, on condition that the title be returned to her within a month or two. On 23 February 1979, at about 10am, the

first defendant again went to see the first plaintiff. During that visit, the first plaintiff said she was alone in her house. The first defendant brought with him a document for her to affix her thumb-print on. She was not told anything about the contents of the document and she did affix her thumb-print on the document as told to do so by the first defendant. When the first defendant failed to return the title to her within two months, the second plaintiff wrote to the first defendant to ask for the return of the title. There was no response and thereupon, the second plaintiff and his son, one Doraisamy, went to see the first defendant at his house about the title. The first defendant gave all sort of excuses for not returning the title and he promised to return the title in due course. After waiting for about one year, the second plaintiff again went with his two sons to see the first defendant. It was then that the first defendant told the second plaintiff that the title had been handed to the second defendant as security for a loan, but the first defendant again promised them that he would return the title to the first plaintiff later. When the first defendant failed to return the title after the plaintiffs had waited for another year, the latter thereafter engaged a lawyer to file this suit. The first plaintiff said in her evidence that she was illiterate, while the second plaintiff could only read and write Tamil.

The defence of the first defendant is that he personally informed both the plaintiffs as well as their son, Doraisamy, the reason for his wanting to get the title of the disputed land from them and that was to use it as security for a loan which he was applying for from a bank. According to him, it was on that basis that both the plaintiffs agreed to let him have the title.

With regard to the second defendant, their defence is that there was no fraud committed by anyone in the present case. Even had there been a fraud committed, it was committed by the first defendant, and the second defendant had no knowledge of any such fraud let alone was acting in collusion with the first defendant to defraud the plaintiffs. They also denied any negligence on their part. They averred that they had acted properly and in accordance with law in accepting the title of the disputed land as security for the banking facilities granted to the first defendant, and that the lien-holder's caveat had been properly and lawfully created and lodged over the disputed land by them.

In considering the question of fraud allegedly committed by the first defendant against the two plaintiffs, particularly the first plaintiff, it is to be noted that, in setting out the particulars of fraud of the first defendant in para 14 of the statement of claim, the plaintiffs averred, inter alia, that: (i) the first defendant failed 'to disclose the actual purpose of taking the title deed'; and (ii) that he 'fraudulently obtain[ed] the thumb-print of the first plaintiff on sheets of papers at her house'. Alternatively, the plaintiffs averred that the first defendant gained possession of the title under the pretext that it would be used to secure a contract job, and that it was by misrepresentation that the first defendant managed to obtain the thumb-print of the first plaintiff. Again, in considering the question of fraud, there is no doubt at all that the first question that should be asked is this: What exactly did the first defendant tell the plaintiffs when he visited them on 20 February 1977 to try to get the title of the disputed land? On the one hand, both the plaintiffs

said in evidence that the first defendant merely told them that he required the title for the purpose of showing it to the relevant authority, to whom the first defendant had applied for certain contract works. On the other hand, the first defendant's version was that he did inform both the plaintiffs at the material time that he required the title for the purpose of utilizing it as security for a loan from the second defendant. In view of these two inconsistent versions, it is needless to say that I have to scrutinize with much care, the totality of the evidence in order to determine whose version is more probable. In my scrutiny of the totality of the evidence, the first thing that struck my mind was that there was no dispute that both the plaintiffs had been working as rubber tappers (although the second plaintiff subsequently was promoted to the post of a mandor) for over 25 years, before they could save enough to think of purchasing a piece of land. It is their hard-earned money which they had prudently saved that enabled the disputed land to be purchased in 1975, which land was registered in the name of the first plaintiff. Furthermore, they had constructed a house on the disputed land, in which they and their children were and still are residing. Under the circumstances, it is highly incredible that they would be willing to embark on any transaction which might cause them to be deprived of this one single property. No reasonable person in the shoes of the plaintiffs would be willing to take any risk of losing his land which he managed to buy from his savings accumulated over some 25 years. This proposition is supported by the evidence given by PW1 (the first plaintiff), when she said, 'Saya tidak akan beri geran tersebut kepada sesiapa, walaupun anak saya sendiri, untuk pinjaman duit.' (Translation: 'I would not give the title to anyone, not even my own son, for the purpose of getting a loan.') Indeed, even DW1 (the first defendant,) admitted in cross-examination that the plaintiffs owned no other property except the disputed land and that DW1 knew that they would never part with it. If, as asserted by DW1, the plaintiffs would never part with it, would it not be reasonable to opine that, under the circumstances, one would not expect them to take any risk which might jeopardize their ownership and possession of the disputed land? The second thing that struck my mind relates to the assertion by the first defendant that he did tell the plaintiffs the purpose of his wanting the title to the disputed land, that is as security for his bank loan. Bearing in mind that to allow the disputed land to be held by a bank as security for the loan to be granted to the first defendant would inevitably involve an element of risk which would jeopardize the first plaintiff's ownership and possession of the disputed land, it is again highly incredible that the plaintiffs would agree to accept such a risk. The evidence given by PW1, which I have reproduced earlier, lends support to such a proposition. It might be argued that as the plaintiffs belong to the labour class and being illiterate, they might not be aware of this risk. Such argument is best said and rejected for the simple reason that the plaintiffs, being elderly persons, must surely understand the implications involved in guaranteeing the repayment of a loan given to a third party. I use the word 'guaranteeing' because in allowing the disputed land to be held as security for the loan, the plaintiffs would, in effect, be guaranteeing the repayment of the loan. Should the first

defendant fail to repay the loan, the plaintiffs must surely know that the title of the disputed land would not be returned to them. The third point that is worthy of consideration relates again to the assertion made by the first defendant when he said in his evidence-in-chief, that when he explained to the plaintiffs on 20 February 1977 about his need of the title as security for a loan, the plaintiffs' eldest son, V Doraisamy (PW3), was not only present, but it was he who advised the first defendant to approach his parents for the title after the first defendant had informed him about the latter's financial problem and the reason for acquiring the title. This discussion was, according to the first defendant, carried out in Doraisamy's house where the first defendant made a stopover upon his arrival at Batang Berjuntai on the evening of 20 February 1977. It was after the discussion that V Doraisamy accompanied the first defendant in the latter's car to proceed to the plaintiffs' house, where the discussion with the plaintiffs on the matter of the loan took place. PW1 and PW2, in their evidence, categorically denied that their eldest son was present at the said discussion. Instead, they asserted that V Doraisamy was, at the material time, in Ipoh undergoing a training course. V Doraisamy himself, in his evidence, corroborated what was said by his parents — he was at the material time attending a course for Askar Wataniah in Ipoh. He produced a letter dated 22 January 1991 (exh P2), which confirmed that he was attending such a course held in Ipoh from 8 February 1977 to 5 March 1977. The evidence of PW3 had not been successfully challenged, neither was it contradicted in any material way. The fourth matter that disturbs me concerns the thumb-printing of D6. In considering this matter, it is necessary to examine the contents of D6 which reads as follows:

Nallammah a/p Muthusamy
Thenamaram Estate
Batang Berjuntai
Selangor
Malaysia

23 February 1977

The General Manager
Bank Buruh
Kuala Lumpur

Dear Sir

I, Nallammah a/p Muthusamy (IC No 7921639) of Thenamaram Estate, Batang Berjuntai, Selangor, have no objection to a caveat being lodged on my property known as EMR 2118, Lot No 238, Mukim of Batang Berjuntai, for the purpose of a loan granted to Sharikat Karuppanan of 750B, Jalan Gambut, Kuantan.

Yours faithfully
(Thumb-print)

Even upon a cursory reading of D6, it cannot be said that D6 merely indicates that the first plaintiff had no objection to the title of the disputed land being kept by the second defendant, as security for the loan to be granted to the first defendant. D6 goes further, in that it indicates that the

first plaintiff had no objection to *a caveat* being lodged on the disputed land for the purpose of the said loan to be granted to the first defendant's company. The crucial question that I need to ask myself is whether, at the material time, the contents of D6 had been fully explained to the first plaintiff before she affixed her signature on D6. Bearing in mind the nature of the disputes in the present case, it is significant (as can be seen later in this judgment) to find a correct answer to this question. Now, in going through the totality of the evidence, I found that the first plaintiff categorically denied that the contents of D6 were ever conveyed to, let alone explained to her. The two witnesses, DW2 and DW3, who testified for the second defendant, could not even say who prepared D6 or who brought D6 to the second defendant. All they could say was that the second defendant made use of D6 as an authority to lodge a lien-holder's caveat on the disputed land. The first defendant as DW1, however, was able to give some evidence relating to the person or body who prepared D6. According to DW1, D6 was handed over to him by one Mr Charles, an officer of the second defendant, and in doing so, Mr Charles was said to have told DW1 that D6 merely indicated that 'the owner of the title had no objection to the title being kept as security for the loan'. It is not disputed that neither DW1, nor both the plaintiffs, could read English. It must, therefore, follow that even assuming that DW1 had explained the contents to the first plaintiff at the time when she was asked to sign D6 as asserted by DW1, the latter's explanation would carry no further than what Mr Charles had informed him about the contents of D6. Indeed, DW1, in his evidence, said that the first plaintiff kept asking him subsequently for the return of the title and accused him of cheating her 'and not telling her of the caveat'. In such a situation, I cannot but hold that the first plaintiff was not fully aware of the effect and consequence of D6 when she thumb-printed it as alleged by the first defendant. Had she been told that a lien-holder's caveat would have to be entered on the title to the disputed land, an opportunity would have been given to her to consider and perhaps to seek advice from a third party as to whether she should allow the disputed land to be caveated as security for the loan taken by the first defendant. As I have stated earlier, the disputed land was the only property owned by the first plaintiff and on the disputed land, she had built her house in which she was, and is still, residing with the second plaintiff and their children. Had the first plaintiff been told of the nature of D6, it is most probable that she would, at the very least, have questioned the first defendant as to his capability to repay and the manner of repaying the loan. From the evidence, both the plaintiffs said repeatedly that they would only hand over the title of the disputed land to the first defendant provided that he returned it within a month or two. The first defendant, in his evidence, also said that in handing over the title to him, both the plaintiffs repeatedly did say that they would only hand the title to him provided he returned the same to them 'as quickly as possible'. This piece of evidence shows that it is highly improbable that the first plaintiff would have signed D6 as allegedly by the first defendant, had she been told of the contents of D6.

The fifth matter which I have to take into consideration is the following question posed to the first defendant in cross-examination by counsel for the plaintiffs: 'When you saw the first plaintiff, did you explain to her that you wanted the title to be retained as security for a loan from the bank on the sum of RM200,000?'

His answer was a simple 'No'. In re-examination, he tried to repair the damage done to his case by saying that he did convey to the first plaintiff his intention of getting the title to the disputed land, which was 'to get a loan', although he did not mention the amount of the loan he was to get from the second defendant. But his answer given in the re-examination was still inconsistent with what he had said earlier in the cross-examination. The question posed to him earlier was: 'Did you tell the plaintiffs how much loan you were taking was?'

His answer was: 'I explained to them that I needed a loan for a sum of RM200,000...'.

Notwithstanding the inconsistency, DW1's assertion that he did not inform the plaintiff of the amount of the loan to be taken by him is part of his evidence and, as such, it cannot be disregarded.

In considering this assertion of DW1 in the context of the evidence as a whole, I would have to say that the said assertion only goes to lend support to the plaintiff's case simply because it is highly incredible that the plaintiffs would be willing to hand the title of the disputed land to the first defendant as security for his loan, the amount of which was not even made known to them. It is incredulous that an owner of only one piece of landed property would agree to let that property be used as security for a loan, without knowing the amount of the loan which might well reach over a million ringgit. In the nature of things, I would say that the owner of such a land would certainly want to know the amount of the loan before he could even begin to consider whether to accede to the borrower's request for his title. In the ultimate analysis, I am satisfied that the first defendant did not, at all material times, convey to the plaintiffs that he wanted the title of the disputed land for the purpose of using it as security for the loan which he wanted to borrow from the second defendant. I fully accept the plaintiffs' assertion that the reason given by the first defendant for wanting the title was to show it to the relevant authority, who was supposed to consider the first defendant's application for some contract works in clearing jungles.

One final matter, which is relevant viz-a-viz the first defendant's case, is that on the second day of the hearing, counsel for the first defendant informed me that his client accepted that the doctrine of non est factum as pleaded by the plaintiffs in their statement of claim could be applied in favour of the plaintiffs. The only allegation which the first defendant would not admit and would be contesting was the allegation of fraud made against him. Counsel for the second defendant, however, said that he had no instruction to accept the said doctrine and they would be contesting the averment on the affidavits concerning the said doctrine.

In view of the first defendant's acceptance of the doctrine of non est factum as stated above, it is essential to enquire as to the legal effect of such acceptance. The plea of non est factum was formerly held by the English

judges to be available only if the mistake was as to the very nature of the transaction — if a party had been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he could successfully plead non est factum in an action against him — see *Foster v Mackinnon*[1] at p 711. The law on this subject was completely reviewed and restated by the House of Lords in *Saunders v Anglia Building Society*,[2] where it was held that in exceptional cases, the plea was available so long as the person signing the document had made a fundamental mistake as to the character or effect of the document. Their Lordships appear to have directed their minds on the disparity between the effect of the document actually signed and the document as it was believed to be. It was also held that the disparity must be 'radical', 'essential', 'fundamental', or 'very substantial'. Transposing this principle of law to the present case, it is clear that the doctrine is available to the plaintiffs because:

(a) the first plaintiff has no knowledge at all regarding the contents of D6 on which she affixed her thumb-print;

(b) this complete lack of knowledge must result in her thinking that she was signing a document which she believed would not have the legal effect created by the said document; and

(c) the affixation of her thumb-print on D6 would certainly result in a disparity that is fundamental, or at least very substantial, in that she had unknowingly, and without any fault on her part, thumb-printed D6, which certainly had an adverse effect on her ownership and possession of the disputed land. Indeed, if I may go one step further, the first plaintiff was wrongfully misled or induced by the first defendant to affix her thumb-print on D6.

In allowing the plea of the said doctrine against the first defendant, the result is that he has no right in law to make use of D6 as security for the loan and to enable the second defendant to lodge a lien-holder's caveat on the disputed land.

Turning to the issue of fraud, the case of *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd*[3] gives a useful definition of what amounts to fraud where it was said (at p 138):

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as "constructive fraud" are ... inaccurate:' but '"fraud" ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled.' (per Romilly MR in *Green v Nixon* (1857) 23 Beav 530; 53 ER 208). Thus in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 it was said that 'if the designed object of transfer be to cheat a man of a known existing right, that is fraudulent ...'

Transposing this definition of fraud to the present case, and upon the reasons stated earlier in this judgment, I have no doubt at all that the first defendant did defraud the plaintiffs in order to get possession of the title of the disputed land. By his wilful act of misleading the plaintiffs, the first

plaintiff now stands to be deprived of her ownership and possession of the disputed land. If that is not fraudulent, I do not know what is.

I now come to the case for the second defendant. It is common ground that the title deed of the disputed land and the purported letter of consent D6, were, inter alia, relied upon by the second defendant in giving the loan to the first defendant, as well as the lodging of a lien-holder's caveat on the disputed land. Without the title and D6, the second defendant would not have approved the loan application of the first defendant (see exh D3). The defence of the second defendant is that, even had the first defendant obtained D6 by fraudulent means, the second defendant had no knowledge of the same. There is no evidence to suggest, let alone establish, that the second defendant, or their agents or servants, had colluded with the first defendant in defrauding or misleading the plaintiffs. Indeed, the second defendant asserted that the lien-holder's caveat was properly and lawfully lodged.

Once again, I shall examine the case law governing the defence of the second defendant. The case of *Kingsworth Trust Ltd v Bell & Ors*[4] (at p 427) is a good illustrative authority as to the liability (if any) of the second defendant in the present case. In that case, the plaintiffs entrusted Mr Bell to obtain his wife's signature on the mortgage deed in respect of the property, which had at all material times been the matrimonial home of Mr and Mrs Bell. The legal estate of the property was vested in Mr Bell alone but it was not disputed that Mrs Bell had a beneficial interest in the property as she had contributed to the purchase price. The plaintiffs there gave a loan to Mr Bell on the security of the property, by way of a second mortgage created by Mr Bell with the purported concurrence of Mrs Bell. The question posed to the Court of Appeal was whether Mrs Bell could establish that she was not bound by the terms of the mortgage having regard to Mrs Bell's contention that she executed the mortgage at the request of her husband and under his influence and without separate advice. She therefore asserted that the mortgage was not binding on her. The Court of Appeal held in favour of Mrs Bell. Dillon LJ, who delivered the first judgment made, laid down the following principle which is useful to me in my deliberation of the second defendant's case:

> ... if the creditor entrusts to the husband himself the task of obtaining the execution of the relevant document by the wife, then the creditor can be in no better position than the husband himself, and the creditor cannot enforce the guarantee or the security against the wife if it is established that the execution of the document by the wife was procured by undue influence by the husband and the wife had no independent advice.
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> This is clear law. The judge held that these authorities were not applicable to the present case because in the present case Mrs Bell knew that she was signing a charge on her home, although she was misled as to the reason why such a charge was expedient. I cannot, for my part, see that this is a valid distinction. I cannot see any difference in principle between the case of a husband who by his influence procures his wife to execute the document he requires of her without giving her any explanation of it and the case of a husband who in similar circumstances procures the execution of the document by giving her a deliberately false explanation. It cannot matter whether the false explanation relates to the

A nature of the document or the supposed reason why it should be signed; in each case the signing of the document has been induced by a fraudulent misrepresentation.

In the present case, it is appropriate to consider the evidence of a witness, DW3, called by the second defendant to testify on their behalf. DW3 was B one Charles Sathenathan ('Charles'), who was, at the material time, the head of the credit department of the second defendant. He admitted that it was he who, at the material time, dealt with the first defendant's application for the loan. In his dealing with the first defendant, he admitted that a requirement of the bank for the loan was the document, D6, and he did tell the first defendant of the said requirement. However, he denied that he told C the first defendant about the contents of D6. He also denied that D6 was prepared by the bank. Looking at the totality of the evidence adduced at this trial, I am satisfied that Charles did inform the first defendant to get the title of another piece of land as security for the loan. The title would then be held by the second defendant, to enable them to lodge a lien-holder's D caveat. The logical conclusion from this finding is that the second defendant entrusted the first defendant with the task of obtaining, if not D6, at least a document similar to D6, duly signed by the owner of the additional piece of land, before they would approve the loan.

More importantly, one should note that D6 contains only the thumb-print of the first plaintiff. This should at least have suggested to the second E defendant that the first plaintiff, as owner of the disputed land, was an illiterate person who might not have appreciated the contents of D6, particularly when D6 speaks about caveating the disputed land. Furthermore, prior to the confession made subsequently by the first defendant, no one had informed the plaintiffs about using the disputed land as security for the F loan taken by the first defendant and that a caveat had been lodged.

For the above reasons, the second defendant, as the creditor, can be in no better position than the first defendant himself and cannot enforce the security against the first plaintiff, when it has been established that D6 was obtained by misrepresentation on the part of the first plaintiff. In any event, the burden of proof that a lien-holder's caveat has been properly lodged is G a heavy one. In support of this proposition, I would like to quote a passage from an article entitled 'The Nature And Application Of The Torrens Liens And Lien-Holders' Caveats In West Malaysia' by SY Kok appearing in [1983] 1 MLJ xl at p li where the learned writer said:

H It is submitted that nothing requires to be more strictly proved than the proof of an alleged Torrens lien or statutory lien purported to be created by an entry of a lien-holder's caveat on the strength of a mere deposit without any supporting written memorandum. This strictness is to guard against any fraud that could possibly be practised on a proprietor. To make out the element of deposit, it is incumbent on the plaintiff-depositee to prove that the proprietor's act of deposit was made on the advance of the money; the depositee must connect the deposit I made between the depositor (proprietor) and himself with the advance. To do otherwise would mean interpreting the Torrens sections creating liens too loosely and contrary to the views shared by the judges in the Federated Malay States that such sections should be strictly construed and applied or else the security of

tenure of land which the Torrens statutes seek to set up would be seriously undermined. *To hold otherwise would mean that every landowner in West Malaysia is liable to have his estate caveated by an improper lien-holder's caveat, by the mere production by any stranger of the proprietor's title to his land, without any proof of how the title may have got into the stranger's possession.* To uphold this incorrect interpretation would amount to a solecism of the substantive law governing the creation of Malaysian Torrens liens and could lead to ridiculous legal principles being set whereby possession of title to land by fraud or misrepresentation or even a simple deposit of a title to land by a vendor (or a developer) with a purchaser or the purchaser's financier so as to facilitate the registration of an instrument of transfer and subsequent charge could be misconstrued by the financier or its advisers as being within the ambit or operation of s 281(1) [of the National Land Code 1965] when, right at the offset, no connection between the deposit of title and the housing loan could be shown by the financier to exist between the vendor-depositor and the financier-depositee. (Emphasis added.)

The learned writer also gave several instances whereby the element of deposit of title was deemed to be unconnected with the loan advancement and was, therefore, not proven, and I need only mention two of such instances. They were: (i) possession of title obtained by a depositee through fraud or misrepresentation; and (ii) deposit of title which had not been authorized by a proprietor or was carried out without the consent of the proprietor. In the present case, it is clear that the possession of the title to the disputed land was obtained by the first defendant through fraud or misrepresentation and, as such, the deposit of title had never been authorized by the first plaintiff the proprietor of the disputed land.

From my findings as set out above, the only conclusion I can arrive at is that there is insufficient proof of the alleged Torrens lien or statutory lien purported to be created by the proprietor of the disputed land, that is the first plaintiff. On the contrary, the plaintiffs have discharged the burden of proving that the title of the disputed land was wrongfully taken from the first plaintiff by the first defendant to create a lien on it. It follows, therefore, that the lien-holder's caveat was likewise wrongfully lodged on the disputed land. The orders or declarations requested for by the plaintiffs in prayers (a), (b) and (d) are allowed. Prayer (e) is for damages for fraud which has been withdrawn by the plaintiffs. The first and second defendants are directed to pay the costs of this proceedings to the plaintiffs.

Order accordingly.

Reported by JE Rajasooria